United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

PETITION

75-4164

ORIGINAL

APPEAL

75-6068

B P/C

United States Court of Appeals

FOR THE SECOND CIRCUIT

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

Plaintiffs-Appellants,

—against—

RUSSELL E. TRAIN, *et al.*
["Federal Defendants"],

Defendants-Appellees, and

HERITAGE HILLS OF WESTCHESTER, *et al.*
["Private Defendants"],

Intervenors.

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

Petitioners,

—against—

ADMINISTRATOR OF THE U. S. ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN,

Respondent, and

HERITAGE HILLS OF WESTCHESTER, *et al.*

Intervenors.

Appeal from the U.S. District Court for the Southern District of New York

Petition to Review Order of U.S. Environmental Protection Agency

REPLY BRIEF FOR APPELLANTS-PETITIONERS

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Dated: New York, New York
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REPLY BRIEF FOR APPELLANTS-PETITIONERS

PRELIMINARY STATEMENT

Appellants-Petitioners in this consolidated proceeding submit this Brief in reply to the Brief dated November 19, 1975, submitted for Appellees-Respondents Train, Hansler, Morton and the United States of America.

By Order of this court dated November 14, 1975, the time of the Intervenors to file their brief was extended to December 3, 1975. Pursuant to Rules 28(c) and 31(a), Federal Rules of Appellate Procedure, the Appellants-Petitioners respectfully reserve their right to file a further reply brief if necessary in response to the Intervenors' brief.

I. THE DENIALS OF APPELLANTS-PETITIONERS' PROCEDURAL RIGHTS HAVE RESULTED IN ISSUANCE OF A NPDES PERMIT WHICH ALSO VIOLATES THEIR SUBSTANTIVE RIGHTS AND ALLOWS IRREPARABLE POLLUTION OF THE ENVIRONMENT.

A. Procedural Duties

In their defense, Appellees-Respondents have attempted to argue that in issuing this National Pollutant Discharge Elimination System Permit No. N.Y. 0026891 ("NPDES Permit") (1a-16a),* the actions of the Environmental Protection

* Page references to the appendix attached to the Brief of Appellees-Respondents are suffixed by the lower case letter "a". References to the appendix of Appellants-Petitioners are prefaced by a capital letter A: additional documents are appended hereto, continuing with page A59 the pagination of the documentary appendix in Appellant-Petitioners' Brief of October 20, 1975.

Agency ("EPA") "have more than adequately protected the environment." (App.-Resp. Br. at 35).

EPA makes this contention without once referring to, much less rebutting, the unrefuted evidence of record that levels of phosphates and nitrates in the sewage effluent discharge authorized by the NPDES Permit will cause eutrophication of the surface waters in Brown Brook and No Bottom Marsh, and that the effluent will then contaminate the drinking water aquifer beneath the Marsh.

Not wanting to burden an appellate court with substantial factual contentions, the Appellants-Petitioners took the denial of their procedural rights to the District Court. The procedural rights here are not mere technicalities; if each procedural step were adhered to, the protection of the Marsh and aquifer would have probably been assured. By short-cutting the established procedures, a new pollutant is now destroying the very resources which the federal environmental laws were designed to protect.

An outline of each step of the process by which the instant NPDES Permit was issued will make this clear. A necessary preface to the outline of EPA actions is the account of events before the New York State Department of

Environmental Conservation ("DEC") which preceeded the application for the NPDES Permit.

As soon as the Intervenors' plans for the condominium apartment housing project known as Heritage Hills of Westchester ("HHW") were announced, Lyman E. Kipp ("Kipp") and Sun Enterprises, Ltd. ("Sun") in 1972 brought the need to protect their wetlands stream and aquifer to the attention of the DEC (A59-A61). Alternative sites for the effluent discharge pipe were presented. HHW has refused even to confer with Sun or Kipp to reach a compromise respecting Sun's interests.

No governmental action was taken on these letters because no official application had been made. The first official action regarding the stream was an application for relocating the streambed to allow construction of the sewage treatment plant for HHW ("Stream Protection Permit"), pursuant to §15-0501 of the New York State Environmental Conservation Law, 17 1/2 McKinney's Consol. L. of N.Y. ("ECL").

Sun and Kipp retained several expert witnesses to testify at the hearing for the DEC Stream Protection Permit in September and October 1973. When their attorney William Florence, Esq., attempted to adduce evidence in opposition

to the plant site because of the plan to dump sewage treatment effluent into Brown Brook just above the Marsh and aquifer, HHW's counsel objected. Some evidence was presented over HHW's objections. Before a complete record could be made, the DEC hearing officer ruled that such evidence was inappropriate for the Stream Protection hearing, and could only be raised during a State Pollutant Discharge Elimination System ("SPDES") Permit application, pursuant to §17-0803, ECL. (A62-A76).

The DEC's narrow view of its jurisdiction on the Stream Protection Permit meant that the environmental harm from the sewage treatment waste to the Marsh and aquifer were never presented. The DEC could have taken a wider view and required an "environmental impact assessment" under 6 N.Y.C.R.R. Part 615, but it decided not to do so. Cf. Ton-da-lay, Ltd. v. Diamond, 355 N.Y.S.2d 820 (3rd Dep't 1974).

The DEC also decided never to hold a SPDES hearing, although the Department had noticed its intent to receive comment and hold a hearing if warranted.

Had either of these expanded hearings been held, the protection requirements of the Marsh and aquifer might have been presented. Since neither were, facts about the need for such protection were never fully received by the DEC.

Meanwhile, on or about December 27, 1973, HHW applied to the federal EPA for an NPDES Permit. The EPA had not yet acted under §402(b) of the Federal Water Pollution Control Act Amendments, 33 U.S.C. 1342(b) ("Water Act"), to delegate authority for the issuance of such permits to the DEC, although the SPDES authority had been enacted in New York State law.

Kipp and Sun were not advised of these DEC or EPA decisions. The attorney for Kipp and Sun, Florence, made a further offer of proof to the DEC by letter of January 11, 1974 (A2), but received no reply.

When Kipp did come to learn of the HHW application to EPA for an NPDES permit, he assumed it was separate from the DEC proceedings and he personally wrote EPA asking protection at this further level of government on May 28, 1974 (A12-13). That letter advised EPA of the marsh, the well-water drinking supply, and the harm from nutrients (meaning nitrates and phosphates leading to eutrophication). It clearly identified the property owner. EPA never replied to this letter. It was not a letter written on advice of counsel and as a citizen Kipp sought and expected a sympathetic and responsible response from the EPA.

The only indication of EPA having considered Kipp's letter or the natural resources of the Marsh and Stream appears in an in-house EPA memorandum dated June 24, 1974 (A14-16). The procedures preliminary to the memo are generally described in an EPA rule-making letter (A6-9). The volume of NPDES Permit applications was high and to cut-short the workload, the EPA decided "to place greater reliance on direct telephone communications" (A7).

Thus, the author of the June 24th EPA memo probably got most of his information by telephone. He cited the DEC Stream Protection Permit hearings as his authority without ever even seeing the transcript. He quoted from dicta in the Stream Protection Permit Decision indicating that the Applicant will have to comply with the SPDES provisions of the ECL and the Water Act. (A15) The hearing transcript was never transmitted to the EPA.

This memorandum makes clear that the EPA made no independent assessment of what would be required to protect Brown Brook and No Bottom Marsh. Significantly also, it shows that EPA totally ignores the aquifer and measures which might protect the drinking water supplies.

This complete disregard for the wetlands, aquifer, fish and wildlife [in reliance on an unrelated DEC hearing the record of which was never examined] is even more puzzling because the DEC explicitly told the EPA in making its certification by letter of April 5, 1974 (A77-A79):

> "...[M]ost of the issues raised by parties-in-interest were covered and addressed to during the [DEC] hearing. However, particular reference is made to a letter, dated January 11, 1974, to the State of New York, Department of Environmental Conservation, from W. J. Florence, Jr., in behalf of Sun Enterprises, Ltd., in which is indicated that expert testimony is available to be produced as to the effect of subject discharge on Brown Brook." (Emphasis added, at A78-A79)

Attorney Florence's letter is at A2. It was sent to the EPA. Since the DEC states that "most" issues were covered, it implies thereby that some were not. Through receipt of Florence's letter to the DEC and Kipp's letter to the EPA, the EPA was clearly on notice that substantial issues remained to be explored and that experts were available to help the EPA make the necessary examination.

EPA's statutory obligations in considering an application for a NPDES Permit are specified in §401 and §402 of the Water Act, in the wetlands regulations 38 Fed. Reg. 10834 (May 2, 1973) and in the Fish and Wildlife Coordination

Act, 16 U.S.C. 662 ("Coordination Act"). Contrary to EPA's contention (App.-Resp. Br. at 39), its duties under these provisions are neither discretionary, nor have been adequately performed here, nor are inconsistent with the Water Act. These procedural steps are the following:

(a) The State shall certify to the EPA effluent limitations which protect the waters under, inter alia, §302 of the Water Act, 33 U.S.C. 1312 [the sufficiency of the DEC's action is not on review here].

(b) Section 401(b), 33 U.S.C. 1341, preserves the EPA's collateral and separate duties such as to protect wetlands, 38 Fed. Reg. 10834, and to have actual consultations with Interior, 16 U.S.C. 662.

(c) "After opportunity for a public hearing," the EPA under §402, 33 U.S.C. 1342, must independently establish that the certified effluent limitations will protect the waters, inter alia, under §302.

(d) According to EPA's regulations, public notice of complete applications and permits shall be printed in a local newspaper and mailed to any person on request. 38 Fed. Reg. 135727 at 13535-6 (May 22, 1973).

In the case of the instant NPDES Permit, the DEC certified effluent limits; this certification was based apparently solely on the incomplete Stream Permit Application Hearing which did not cover SPDES issues, and on the official statewide classification system for streams under §15-0313, ECL, which classified Brown Brook as a trout-stream on the Sun property and an intermittent stream above No Bottom Marsh where the Brook traverses the HHW property.* No DEC classification was made as to the aquifer.

Rather than give an opportunity for public hearing, or await a consultation with Interior, or make further inquiries to become satisfied that the wetlands would be protected, the EPA simply rubber-stamped the DEC certification and draft permit. The additional permit conditions imposed by EPA (A16) on the standard form permit draft sent by the DEC in no way reflect an independent assessment of whether there will be conformity with the requirements of, inter alia, §302 of the Water Act.

Had EPA called on Kipp and Sun to present their proferred evidence, had EPA pursued the separate inquiries under the wetlands regulations or Water Act, or had EPA made a truly independent analysis, protection for the Marsh and aquifer might have been forthcoming. Instead, EPA did not even obey

* Stream classification is described in the Affidavit of Dr. Raul Cardenas, Jr., sworn to February 23, 1975; Document 47 on appeal.

its own regulations and failed to give Sun and Kipp personal notice of issuing the NPDES Permit. Instead also, with the same shipshod disregard, the printed notice of the Permit's having been issued appeared in the Peekskill Evening Star, a newspaper which was not local and which neither Kipp nor Homan and the Southern New York Fish and Game Association members reasonably could have been expected to read.

The DEC's notices did appear in the local newspaper, the Reporter-Dispatch. Both papers are part of the Gannett newspaper chain and the circulation figures are those of the Gannett's independent audit, not merely "Appellants' figure" as the EPA cavalierly suggests (App.-Resp. Br. at 22). (See A80-A83).

The notice printed in the Peekskill Evening Star meets none of the constitutional or Water Act requirements for good notice. See generally "Notice," 66 CORPUS JURIS SECUNDUM §18. If the DEC knew the local paper of general circulation which the Town of Somers designated the official newspaper of record for its notices, why could not the EPA find this paper. EPA has never said why it choose a Peekskill paper.

As was said in Bellingham Bay, etc., R. Co. v. City of New Whatcom, 172 U.S. 314 at 318-319 (1898):

> "The purpose of notice is to secure to the owner the opportunity to protect his property from [some governmental act] ... If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking care of his property, will receive the information of what is proposed and when and where he may be heard."

In Bellingham Bay, the paper used was the official city newspaper. "Where else would one interested more naturally look for information?" asked the Court. Apparently EPA never asked the question. Cf. Sage v. Central R. Co., 99 U.S. 334, 346 (1879); N.Y.C. v. N.Y. H.H.H. R. Co., 344 U.S. 293 (1953). The New York State cases adduced by Appellees-Respondents do not support a claim that notice here was adequate. For the record, a copy of the notice should have been filed with proof of publication on the return of the Petition, not offered up at argument. Let the notice be filed to complete the record, along with EPA's explanation (if any) of how the Peekskill Evening Star was selected as a local newspaper and the Reporter-Dispatch was not.

B. Substantive Rights

As for the actual facts showing the substantive insufficiency of the NPDES Permit, the affidavits of Professor Raul Cardenas, Ph.D, a professor at the Polytechnic Institute of New York, establish that the effluent limitations for Phosphorous (as orthophosphate) and ammonia (as nitrogen), NH_3-(N), (at 8a), as well as the absence of any limit on nitrate (as nitrogen) are insufficient to prevent eutrophication of the waters in No Bottom Marsh. Dr. Cardenas' testimony establishes that the sewage treatment effluent actually now being discharged into Brown Brook is causing eutrophication. The sewage effluent acts as "fertilizers" causing the deterioration in water quality and leading to eutrophication (A84-A92).*

Dr. Guenther Stotsky, Chairman of the Biology Department at New York University and a world recognized expert on soils, has testified that once the eutrophication has occurred, the same chemicals will penetrate to the aquifer as may fecal coliform, viruses and other contaminants. (His affidavit, sworn to December 2, 1974, is in document 9 on appeal.)

Meanwhile, the other expert and personal affidavits

* See the affidavits of Dr. Raul Cardenas, Jr., sworn to December 2, 1974; February 23, 1975; February 28, 1975; and April 17, 1975. The latter two affidavits are annexed as A84-A92. The December 2nd Affidavit is Document 10 on Appeal; the February 23rd affidavit is Document 48 on Appeal.

show that the fish in Brown Brook and its ponds have been killed and the wildlife habitat has deteriorated as a result of HHW's construction and discharge of sewage treatment effluent.

Against this factual background, all that the EPA now asserts is the NPDES Permit requires "best applicable control technology currently available." (App.-Resp. Br. at 36). However, that conclusion is factually contested by the experts presented by Appellants-Respondents (See Affidavit of Dr. Alan Molof, sworn to December 11, 1974; Document 11 on Appeal). Even if it were true, it does not mean that the discharge pipe could not be relocated off of Brown Brook onto Plum Brook where no wetland or aquifer exist to be defiled. HHW owns contiguous parcels of property to and including a stretch of both sides of Plum Brook. Sun, a downstream riparian owner of Plum Brook also, has urged repeatedly pumping the effluent to Plum Brook and has no objection to a discharge there.

Thus both the state of the control technology and effluent discharge limits are in contest. It is fatuous for the EPA to contend that §302 limits need not be reached until 1983, and that therefore this new pollution source can contaminate a clean stream at will until then (App.-Resp. Br.

at 37). The NPDES Permits are means to protect waters now. Old sources of water pollution may gradually be brought into compliance. New sources, however, must comply at once.

Indeed, pursuant to §511, 33 U.S.C. 1371, if EPA had issued its regulations prescribing performance standards for such a plant which is a "new source" under §306(a)(2), 33 U.S.C. 1316(a)(2), the NPDES Permit application would have had to comply with the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq.; ("NEPA"); see proposed regulations at 40 Fed. Reg. 47714 (October 9, 1975). With the protection an environmental impact analysis, the Marsh and aquifer might also have received protection. This new source must protect the hitherto unpolluted trout stream and wetland, not contaminate them.

It was EPA's own inability or lack of desire to carefully implement the NPDES Permit procedures which has caused harm to the Appellants-Petitioners and the public generally. The hiatus prior to promulgating regulations for new sources was not intended as a carte blanche authority for abdicating such duties, as EPA appears to be urging.

At most, Appellants-Petitioners have established a basis for invalidating the NPDES Permit and enjoining the

use of the sewage treatment discharge pipe. At the least, the use of the instant NPDES Permit must be stayed pending a remand to the Administrator of the EPA.

II. JURISDICTION OVER DIFFERENT CLAIMS HERE VESTS RESPECTIVELY IN THE DISTRICT COURT AND COURT OF APPEALS.

The judicial review provisions of the Water Act, like the Clean Air Act* before it, are not models of clarity. However, even acknowledging this difficulty, it is too facile a solution for the District Court to cleave this Gordian Knot by renouncing all District Court jurisdiction simply because a NPDES Permit is involved.

In the instant case, the District Court's application of a rule of exclusivity grounded on §509 of the Water Act has caused a hardship to Appellants-Petitioners here. Their plight was generically discussed in a Note entitled "Jurisdiction To Review Federal Administrative Action: District Court or Court of Appeals," 88 HARVARD L. REV. 980 at 997-1000 (1975). The commentators there harshly criticise the sort of position urged by the EPA in the instant proceedings. "[T]he hardships resulting from a strict interpretation of limitations on statutory review and rigid enforcement of the

* Citations to the parts of the Clean Air Act derived from the Air Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485 (1967), and from the Clean Air Act Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676 (1970), are as set forth in the United States Code, 42 U.S.C. §1857 et seq. (1970), referred to herein as "The Clean Air Act."

rule of exclusivity clash with the policy embodied in APA's [Administrative Procedures Act's] presumption of reviewability." Id. at 999.

Like a tennis ball, the claims pressed here run the risk of being shuttled back from one court to another, without a ruling on the merits, and incurring the risk of having a statute of limitations unduly restrict or deny any review whatsoever. It was this hardship which the Court in Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 667 (D.C. Cir., 1975) specifically disparaged in connection with the time limits of the Clean Air Act (upon which §509 of the Water Act is based): "...[W]e should now indicate that, except in particularly simple cases, we shall look with disfavor upon undue semantic reliance on this preliminary jurisdictional rationale as a device to avoid discussion of the merits in the agency proceeding ... [W]e think there will be few, if any, requests for strengthening of standards of performance that merit no substantive response at all."

In light of this prefatory frame of reference, the jurisdictional validity of each of the jurisdictional bases invoked before the District Court, and the jurisdictional validity of the §509 Petition filed in this Court will be apparent. There can be no further delay in reaching the

merits of Appellants-Petitions' claims and awarding them relief.

A. The District Court's Jurisdiction

Section 509 of the Water Act vests exclusive review of standards and the issuance of denial of NPDES Permits in the Circuit Court for the Circuit where the complainant resides or transacts business. It is unclear what is encompassed in the phrase "issuing or denying" NPDES Permits. Since every other act assigned to review under Section 509 involves a standard, it is fair to construe the scope of NPDES Permit review to the effluent limitations and conditions which are analogous to standards. In this respect, §509 is analogous to §307 of the Clean Air Act, 42 U.S.C. 1857h-5, which has no provisions equivalent to the NPDES Permits.

Review of the rights to notice and a hearing may be viewed as either denials in their own right cognizable under federal question jurisdiction, 28 U.S.C. 1331, and the Administrative Procedure Act, 5 U.S.C. §§701-6 ("APA"), or as part of the decision for arriving at the conditions or effluent limitations of the NPDES Permit. Since nothing in the Water Act appeared to require ousting the District Court's jurisdiction conferred by the APA and federal question

provisions, and in fact since §505(e) and §511, 33 U.S.C. 1365 and 1371 respectively, appear to explicitly preserve such further jurisdictional bases, the Appellants-Petitioners sued in District Court.* They did not invoke §509. The ready availability of fact-finding and preliminary equitable relief made the District Court appear to be the more appropriate forum. Cf. Union Elec. Co. v. EPA, 515 F.2d 206 at 211 (8th Cir., 1975); S. Terminal Corp. v. EPA, 504 F.2d 646 at 665 (1st Cir., 1974).

Similarly, the duties under EPA's wetlands regulations, 38 Fed. Reg. 10834 and under the Coordination Act, are unrelated to the Water Act; they are coordinate provisions of law enacted under their own separate organic acts.

The Coordination Act reflects federal concern for wildlife protection since 1934. The 1958 Amendments, Pub. L. 85-624, required consultations which "would have the effect of putting fish and wildlife on the basis of equality" with other federal programs modifying streams, such as pollution abatement under the Water Act. See S. Rep. No. 1981, "Fish and Wildlife Conservation and Water-Resource Developments - Coordination," 1958 U.S. CONG. & ADMIN. NEWS (Vol. 2) 3446 at 3450.

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* Appellants-Petitioners note that this Circuit has not yet ruled on the jurisdiction-conferring aspects of the APA, Aguayo v. Richardson, 473 F.2d 1092, 1101-2 (2d Cir., 1973), but they proceed to rely on the APA for jurisdiction in light of the rulings in the District of Columbia, and the legislative history and Supreme Court dicta discussed in DAVIS, 3 ADMIN. L. TREATISE §23.02 (1958 Ed. with 1965 Pocket Part).

The Wetlands Regulations, 38 Fed. Reg. 10834 (May 2, 1973), were promulgated because of the unique and vital nature of the wetland resource. These regulations were required by the Coordination Act and by NEPA. The Department of Transportation in D.O.T. Order No. 5660.1 (June 25, 1975) has similarly enacted regulations to ensure "the protection, preservation, and enhancement of the nation's wetlands to the fullest extent practicable..." See 6 BNA ENVT. REP., "Current Developments" at p. 416 (July 4, 1975).

Insofar as the EPA also failed to follow mandatory procedures established by the Water Act in issuing the NPDES Permit, the Appellants-Petitioners gave their 60-day notice and duly amended their complaint to reflect such claims pursuant to §505 of the Water Act, 33 U.S.C. 1365. In §505(a)(2), suit against the Administrator for failure to perform any act which is not discretionary is authorized. The acts outlined above in Point I are not discretionary, and are cognizable under §505.

The scope of §505 and the federal question or APA jurisdictional bases recently found interpretation by this Court in N.R.D.C. v. Callaway, -- F.2d --, 8 E.R.C. 1273 (2d Cir., Docket No. 75-7048, September 9, 1975). This Court held "that §505(a) is not the exclusive jurisdictional basis

for suit under [the Water Act] and that jurisdiction of claimed violations of [the Water Act] can exist under either the general federal question statute 28 U.S.C. §1331, or the Administrative Procedure Act, 5 U.S.C. §701-06. The result is to give effect to the saving clause of §505(e)...." Id. at 8 E.R.C. 1276.

As in N.R.D.C. v. Callaway, supra, here also the complainants advised the EPA of violations and were informed that no action would be taken. Id., footnote 4, 8 E.R.C. 1276. They needed no further exhaustion of futile administrative remedies before filing suit. City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24 (1934). See also Ecology Center of La. v. Coleman, -- F.2d --, 8 E.R.C. 1168 (5th Cir., Docket No. 74-3907, July 11, 1975), at 8 E.R.C. 1170-72, citing with favor Diapulse Corp. v. F.D.A., 500 F.2d 75 (2d Cir., 1974).

The same construction of the Water Act's jurisdictional provisions was reached in N.R.D.C. v. Train, 510 F.2d 692 (D.C. Cir., 1975); accord, Conservation Society of S. Vt., Inc. v. Secretary of Transportation, 508 F.2d 927, 938-39, and note 62 (2d Cir., 1974).

Arguments by analogy to interpretations of the Clean Air Act, as a predecessor statute, do not alter the conclusion that jurisdiction properly was vested in the District Court. Cf. Sierra Club v. Train, -- F.Supp. --, 7 E.R.C. 2030 at 2032-35 (D. Neb., Docket No. CV74-L-159, May 14, 1975); Wisconsin's Envir'l Decade v. Wisconsin Power & Light, -- F.Supp. --, 7 E.R.C. 2022 (D. Wisc., W.D., Docket No. 74-C-18, June 6, 1975), 7 E.R.C. 2024-2028.

Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir., 1975) does not compel a contrary construction of the jurisdictional provisions. Unlike the Appellants-Petitioners in Oljato, the Appellants-Petitioners here have consistently pressed their contentions at every available turn. Also, the Court noted there that the APA vested the District Court with jurisdiction, concurrently with §304 of the Clean Air Act. 42 U.S.C 1857h-2. Oljato, 515 F.2d at 658, citing Scanwell Labs, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir., 1970) and Pickus v. U.S. Bd of Parole, 507 F.2d 1107 (D.C. Cir., 1974).

In discussing the difference between Appellate Review by the original grant of jurisdiction in §307 of the Clean Air Act, 42 U.S.C. 1857h-5, the Circuit Court stressed, notwithstanding the §304 and APA District Court jurisdiction,

that "any litigation seeking revision of a national standard must be brought as a direct appeal to this court under Section 307." Oljato, 515 F.2d at 661.

The Court in Oljato then went on to require submission of the factual claims as to the insufficiency of the national standard to the EPA, in order to make a reviewable appellate record of the issues. In the instant case, by contrast, if the violations of due process for failure to give notice, or for breach of the Coordination Act or wetlands regulations result in voiding the NPDES Permit, the Oljato issues are moot. If the Court reaches the merits of the Petition pending in Docket No. 75-4164, then the Oljato case stands for authority that the NPDES Permit should be remanded to the EPA for substantive review.

As with the Clean Air Act, the scope of §505 "was not designed to mesh neatly with that of" §509, Oljato, 515 F.2d at 661. Unlike Oljato, the Appellants-Petitioners here do present more than colorable claims of jurisdiction under either section. Id.

B. Jurisdiction In The Circuit Court Of Appeals

The only possibly discretionary act asserted here is the failure to set stricter regulations in the NPDES Permit's effluent limitations. The EPA Administrator's failure independently to review the sufficiency of the DEC's certification of such limitations is not discretionary, nor are the duties of notice or of consultation with Interior or of wetlands protection.

Just as the Appellants-Petitioners' invocation of District Court jurisdiction for non-discretionary duties was proper below, so also their Petition before this Court is timely and a proper foundation for judicial review of non-discretionary as well as discretionary acts in issuing the instant NPDES Petition.

While Appellants-Petitioners did not file their Petition until the prescribed 90-day period specified in §509 had passed, the reason for the delay was EPA's failure to give effective notice. Only the diligent search by Sun and Kipp, including filing a futile suit in New York State Supreme Court, resulted in their discovery that a NPDES Permit had issued. Homan and Southern New York learned even later. No

responsible Petition could be filed without initial scientific and legal examination of the NPDES Permit and record. That examination, begun in mid-September 1974, was not concluded until mid-November of 1974.*

Since it was the EPA's failure to give notice which cut-off the effective time to prepare for and file a Petition, EPA is estopped from asserting that the 90-day period is a time-bar. EPA's own violations of law emerge as an equitable estoppel, tolling the 90-day period. See Burnett v. N.Y.C.R.Co., 380 U.S. 426 (1965); Glus v. Brooklyn E. Dist. Term., 359 U.S. 231, 232-3 (1959); Katz v. Amos Treat Co., 411 F.2d 1046, 1055 (2d Cir., 1969).

Moreover, the District Court's ruling that it was without jurisdiction could not have been anticipated. As soon as it was made final, the Appellants-Petitioners filed their appeal and filed the instant Petition, well within 90 days from entry of the District Court's Order. The pendency of the case prior to the District Court's ruling further equitably tolled the 90 days.

The delay in filing the instant Petition was not occasioned by any inactivity or laches. All the recent rulings, cited here and in the other Briefs, construing §505 and §509

* See Affidavit of Nicholas A. Robinson, sworn to September 25, 1975, before this Court in Opposition to motions to dismiss by Appellees-Respondents.

of the Water Act were made after commencing suit here (January, 1975). The guidance these cases afford now was unavailable a year ago. What is clear now, as then, is the clear mandate of law imposed on EPA in the Water Act and in NEPA for protecting the environment.

As this Court said in Steubing v. Brinegar, -- F.2d --, 5 E.L.R. 20183 (2d Cir., Docket No. 74-1911, February 13, 1975), at 20186: "Given the strong public interest in effecting such compliance, the primary question is not how much earlier plaintiffs should have sued, but whether injunctive relief pending compliance would still serve the public interest" and statutory goals.

Suspension of sewage effluent discharges, pending either filing of a new NPDES Permit application or pending remand of the instant Petition to the EPA, is the only relief which will protect Brown Brook, No Bottom Marsh, the aquifer's drinking water and the remaining fish and wildlife from irreparable harm.

It is outrageous that jurisdictional hopscotch should delay reaching the merits of the claims here for the past year. Certainly responsibility for that delay should not be dumped upon the Appellants-Petitioners along with the sewage allowed by the EPA's NPDES Permit.

If for any reason, however, the Court does not toll the 90-day period, the Appellants-Petitioners invoke their right, under §509 of the Water Act, to file a Petition "based solely upon grounds which arose after such ninetieth day." These grounds are two-fold:

(i) the actual fact of eutrophication as discovered by Dr. Cardenas once the pipe began to discharge sewage effluent wastes;* it is immaterial that he predicted such an event before it happened since, from EPA's vantage point, if EPA considered Cardenas' expert opinions at all it must have discounted or rejected them when it issued the NPDES Permit; and

(ii) the District Courts' ruling that it lacked jurisdiction and a §509 Petition would be the only avenue available for relief (A29-A58).

Both grounds are factually accurate and are within a reasonable construction of what "solely" means in §509. The EPA's arguments to the contrary constitute the very "undue semantic reliance ... to avoid discussion of the merits"

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* See A84-A92. Independently of the suit below, the facts in these affidavits were brought to the attention of the EPA last spring by counsel for the Appellants-Petitioners last spring and the EPA declined to either enforce the NPDES Permit conditions which it set or re-examine whether to modify those conditions or effluent limitations. Copies of such correspondence were filed with the District Court but not docketed and thus not a part of the record on appeal. The relevance here is that they were submitted to the EPA prior to being cited in the Petition No. 74-4164.

that the Court in Oljata spurned. Oljato, supra, at 515 F.2d 667.

III. THE COORDINATION ACT WAS FLAUTED BY INTERIOR AND BY THE EPA.

By astute arguments verging on legerdemain, the Appellees-Respondents would have this Court believe that their conduct here has satisfied the Coordination Act.

The arguments presented in Appellees-Respondents Brief are contrary to every reported case, until the District Court ruling below. The Appellees-Respondents contend that the words "first shall consult" in 16 U.S.C. 662(a) here mean only something like "may send a one-line notice that a pollutant may be discharged into a water in New York State and it does not matter if you give any response whatsoever to this notice."

Such an emasculation of the Coordination Act is contrary to its legislative history and all rules of statutory construction.

Is this the "equal consideration" of fish and wildlife issues along with water quality on the recognition of physical, spiritual, recreational and economic values set forth in the Senate Report, S.R. No. 1981, 1958 CONG & ADMIN. NEWS (Vol. 2) 3446? Surely not.

Is this normal inference or mandatory usual construction attached to the word "shall"? Clearly not. See Anderson v. Yung Kau, 329 U.S. 482, 485 (1947). This is not a "precatory" word.

Nor do the cases construing "consult" in other contexts compel a contrary view. (App.-Resp. Br. at 25-6) Most of these examples are irrelevant to the use of "consult" in the Coordination Act, but where applicable at all they support a "bilateral" sense of the word. In the ruling in Garman v. Met. Life Ins., 175 F.2d 24, 27-28 (3rd Cir., 1949), there was actual consultation in a hospital among eight physicians with examinations and advise given and taken. In C.I.R. v. Wathen Distillery Co., 147 F.2d 998, 1001 (6th Cir., 1945), an exchange of substantive letters formed a contract and the consulting arrived thus at a binding pact. Even the New York State case, Teplitsky v. City of New York, 133 N.Y. Supp. 2d 260, 261 (Sup. Ct., Kings Co., 1954)

supports Appellants-Petitioners' view of the Coordination Act and not that of Appellees-Respondents; consultation there was "to prevent sudden and whimsical action by the Commissioner ... so that whatever action he takes will be based upon mature judgment." If no response is forthcoming in a consultation, judgment can hardly be said to have matured.

As for the convoluted dictionary definition of "consult", the Appellees-Respondents misconstrue the Webster's dictionary and the linguistic origin of the word.* The definition of

* At the risk of beating a dead horse, some light diversion into the linguistics at stake here may be useful. Etymological analysis of the verb "consult" does not support the strained definition pressed by Appellees-Respondents. The word was taken into the English from the Latin, consulto, consultare, meaning to reflect, consider maturely, to consult and to take counsel or deliberate; thus it is found in Cicero, "De Officiis" at 3, 2, 7. "... deliberare et consultare de officio," meaning "to weigh well and consult concerning an obligation or duty." The word was thus received into English, with the principal and surviving meaning being "to take counsel together, deliberate, confer." THE OXFORD DICTIONARY (Compact Edition; Vol. I; p. 531; 1971). The Editors of THE OXFORD DICTIONARY cite the use of "consult" by Shakespeare (1594) in "Richard III" V, iii, 45, where King Richard addresses the Duke of Norfold, Sir Richard Ratcliff and Sir William Catesby, saying "Come, Gentlemen, let us consult upon tomorrows business; into my tent, the dew is raw and cold." The preferred Second Edition of the Merriam-Webster Unabridged "Webster's New International Dictionary of the English Language, at 573 (1961 Ed.), concurs with the OXFORD text in defining consult as meaning "to seek the opinion or advice of another; to take counsel, to deliberate together; to confer." The Editors cite the usage by Hobbes, "All the laws of England have been made by the Kings of England, consulting with the nobility and commons." The "Third New" Merriam-Webster's definition describes the verb intransitive as "to take counsel: deliberate together: CONFER." In light of the examples there given, and the linguistic background set forth here, the word "consult" definitely means to confer together with another and to give and receive advice in the process. The Appellees-Respondents' reliance on their own version of the meaning of "consult" is an incorrect make-weight of no help in ccnstruing the Coordination Act.

consult is to talk things over in order to decide or plan something, to confer. Webster's New World Dictionary of the American Language (2d Coll. Ed. 1970, World Pub. Co.). You do not consult unless you plan to exchange useful information.

The EPA should have told Interior at least the following additional facts: The NPDES Permit is proposed for a new municipal sewage plant discharge into a trout stream above a wetland on Brown Brook. At least the U.S. Geological Survey Map quadrangle should be identified so that the Fish and Wildlife Service Staff in Interior could look the location up. (See App.-Resp. Br. at p. 27, footnote 21). There was not sufficient information to enable anyone to discover what impact the proposed NPDES Permit would have or even where it was located.

Moreover, Congress never recognized any absolute waiver of all consultation obligations by Interior. It was Interior that failed to ask for sufficient funds to adequately perform under the Coordination Act. Interior is the trustee of the federal public trust in fish and wildlife. The Secretary of Interior cannot escape his mandatory duties to protect fish and wildlife here anymore than he could with respect to the Redwoods under the Redwood National Park Act. See Sierra Club v. Dep't of the Interior, -- F.Supp. --, 5

E.L.R. 20514 (N.D. Calif., Docket No. C-73-0163-WTS, July 16, 1975). There the Court observed, Id. at 20518:

> "With respect to the defendants' contentions concerning unavailability of funds, the Court further finds that it is the Congress which must make the ultimate determination whether additional sums should be authorized or approriated and also the ultimate determination concerning the items to which such funds should be applied; that the Secretary has never yet gone to the Congress, through the executive or otherwise, either to request the appropriation of the balance of money authorized by the statute, or to obtain whatever additional sums of money may be necessary to implement the specific powers of the statute designed for the protection of the Park."[6] [Emphasis added]
>
> * * *
>
> "6. The only step taken by the Secretary in this direction was to consult, not the Congress, but only the Executive Office of Management of the Budget (OMB) concerning the recommendation of the Curry Report that certain property be acquired in fee; the OMB evidently advised against such acquisition."

Under NEPA, as well as the Coordination Act, now more than ever Interior "is the guardian of the public lands [and is obliged] ... to see that the law is carried out and that none of the public domain is wasted or disposed of to a party not entitled to it." Knight v. United Land Assoc., 142 U.S. 161, 181 (1891); see also Sierra Club v. Dep't of the Interior, 376 F.Supp. 90 (N.D. Cal. 1974).

Since the Fish and Wildlife Service of Interior has the fiduciary responsibility for protecting fish and wildlife, it is axiomatic that the duty to protect and preserve the trust be honored affirmatively. See generally, RESTATEMENT (SECOND) OF TRUSTS, §176 (1959). It is not for the Office of Management and Budget (OMB) to lurk behind the scenes preventing Interior from seeking the funds it needs to exercise responsible trusteeship duties. One need not ascribe an "anti-environmental animus" to OMB to perceive that its acts result in executive repeal of Congressional mandate, unauthorized by our constitutional system. If the burden of compliance is heavy on Interior, it must seek to shoulder it or ask its removal, but it cannot shirk it.

Had EPA and Interior actually consulted, the fish and wildlife might have been protected. Without a consultation, they certainly have not been. The Appellees-Respondents err when they say that 60-days notice was not given under the Water Act; see Complaint and Amended Complaint herein, Documents 1 and 50 on Appeal. No notice is needed under the APA or 28 U.S.C 1331. No further authority is needed to permit suit to enforce by way of mandamus the duty to require consultations. The contentions by the Appellees-Respondents that the Coordination Act gives no private right of action are misplaced since plaintiffs have the standing to sue here and the Court has jurisdiction over their claims.

Furthermore, it will not prejudice Interior to require it to actually consult with EPA regarding the current discharge allowed under the NPDES Permit. The demonstrable harm to the Marsh and Brook, and to the fish and wildlife which they sustain, is shown in the record (see Affidavits of Richard E. Homan sworn to November 11, and December 11, 1974, and of C. Thomas Lyons, sworn to December 9, 1975; Documents 8 and 9 on Appeal). This very prejudice requires enjoining the use of the NPDES Permit until consultation is had pursuant to the Coordination Act. "Present lack of personnel" is simply not a lawful excuse.

IV. THE RELIEF GRANTED HERE MUST INCLUDE VOIDING THE NPDES PERMIT AND ENJOINING DISCHARGE OF SEWAGE EFFLUENT AND REQUIRING APPLICATION ANEW BEFORE THE EPA.

Appellants-Petitioners seek actual relief without the further delay of a remand to either the District Court or the EPA.

They have established a tale of bureaucratic bungling which necessarily requires invalidation of the NPDES Permit. Such a course would require HHW to seek a new permit from scratch. Arguably, since HHW relied on EPA to proceed correctly, this course would cause some inconvenience to HHW. It may be in order, therefore, for this Court to suspend the Permit and enjoin its use, but send the entire proceeding back to the EPA under orders to "do it right."

Under §509(c) of the Water Act, 33 U.S.C 1369(c), this Court has full authority to order the EPA Administrator to reopen the hearing, to consult with Interior, to consider protecting wetlands and subterranean drinking water supplies, along with water quality in Brown Brook.

The EPA Administrator would then modify his findings as specified under §509(c) and file his new determination with this Court which would retain jurisdiction in the meantime.

During such further proceedings, the sewage flow must be stopped. To allow discharge of the effluent in the interim makes a mockery of Appellants-Petitioners' rights. Commercial services exist which will haul off the sewage. Only a few score of condominium apartments are actually occupied. This suit began before a single apartment was sold or occupied and before the sewage treatment plant was operational. HHW proceeded at its own risk to sell units and start up the plant. Before they even used the pipes HHW knew full well of the claims asserted by Appellants-Petitioners about the unlawful conduct by the EPA and Interior. HHW also knew that by its conduct it would harm No Bottom Marsh and Sun's drinking water. HHW consciously decided to use the marsh as an oxidation basin, a buffer zone between its pipe and the New York City reservoir system

into which Brown Brook flows. Its unjust enrichment at the expense of Appellants-Petitioners is apparent in the record.

As a matter of equity, such callous disregard by HHW for the public rights here and the rights of downstream riparians disqualifies HHW from pressing for permission to keep on using the discharge pipe. The party with unclean hands cannot seek to divert for itself the inherent equitable powers of this Court to fashion a remedy to protect Appellants-Petitioners.

Alternatively, this Court could reverse the District Court and remand for proceedings not inconsistent with the ruling. Unless a stay is given of the use of the NPDES Permit and discharge pipe, this course subjects Appellants-Petitioners to the hardships described above in the Harvard Law Review Note, "Jurisdiction to Review Federal Administrative Action: District Court of Court of Appeals," 88 HARVARD L. REV. 980 at 997-1000 (1975): "... such a solution would not alleviate the hardship of shuttling litigants back and forth between courts ...."

Finally, this Court might simply void the NPDES Permit, after declaring the rights of the various parties. This course has been complicated by the EPA's decision on October

28, 1975 to delegate all authority for issuing local NPDES permits to the State of New York through the DEC, pursuant to §402(b), et seq., of the Water Act, 33 U.S.C. 1342(b) et seq. See 6 BNA ENVT REP, "Current Developments" at p. 1217 (October 31, 1975), and at 1264 (November 14, 1975). This course raises some complications, however, since under the Memorandum of Agreement between the EPA and New York State which delegates the authority for the NPDES Programs to the State, the EPA retained jurisdiction over NPDES Permits subject to litigation at the time of the transfer.* The EPA has furnished the parties here with copies of this Memorandum; as an official document, this Court may take judicial notice of its terms. It is unclear whether HHW would then proceed to apply to the DEC or EPA for a new NPDES Permit.

* Paragraph 3 of the Memorandum, dated August 26, 1975, recites "any modifications to the terms and conditions of an NPDES permit issued by the [EPA's] Regional Administrator because of deficiency in certification requirements before the date upon which the Administrator approves the State's permit program, or which is required as the direct result of any ... litigation pending as of the date upon which the Administrator approves the State's permit program will be made by the Regional Administrator; provided, however, that the State retains its right of certification of any such modifications under Section 401 of the [Water Act].

Arguably, if the application was deemed to be before the DEC, no federal issues would remain to litigate and HHW could apply for a new SPDES Permit from the DEC. The DEC would again have to follow the provisions of §17-0803, et seq., of the ECL. No discharge would be allowed in the interim between voiding the permit and issuance of a new permit.

However, in addition to the legal uncertainties, this latter course would result in duplicative and protracted administrative proceedings for the Appellants-Petitioners as well as other parties. The course which ultimately protects all legitimate interests is to void the NPDES Permit and send the proceeding back to the EPA, for expedited review. Since only slightly more than half the States have been delegated authority under §402 for NPDES Permits, there is also precedential importance in making the EPA and Interior review how to comply with the various laws at issue here. The other some 23 states where EPA retains jurisdiction over the NPDES Permit Program could use the clarification of this Court. HHW can store its wastes and have them commercially trucked away in the interim.

In sum, Appellants-Petitioners have established that they are entitled to the judicial relief sought. They have been injured and ask for a speedy redress.

CONCLUSION

NPDES Permit No. N.Y. 0026891 should be voided. The duties of EPA and Interior, should be declared and compliance with those duties be ordered. Use of the NPDES Permit should be enjoined pending remand to the EPA or alternatively application for and granting of a new Permit.

Dated: New York, New York
December 1, 1975

Respectfully submitted,

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DOCUMENTARY APPENDIX

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ADDRESS REPLY TO PEEKSKILL OFFICES

June 27, 1973

New York State, Department of
Environmental Conservation
Mr. George Danskin, Local Permit Agent
21 South Putt Corners Road
New Paltz, New York 12561

Re: Application of Heritage Hills for sewage disposal and storm drainage disposal.

Gentlemen:

I am writing to oppose the use of the Brown Brook and the Sun Enterprises, Ltd. wetland for the deposit of 700,000 gallons daily of storm drainage water and sewage effluent. I represent a lower riparian landowner, Sun Enterprises, Ltd., whose property is contiguous to 3,000 feet of the Brown Brook into which the applicant proposes to deposit sewage effluent and storm water drainage. The Brown Brook is an intermittent brook which empties into a wetland on my client's property of several acres and emerges as a stream. The stream has an entry elevation upon my client's parcel of just under 236 feet on the northern end of the property and traverses some 3,000 feet to a point at elevation 232 feet at the top of the dam, west of the 19th Hole Restaurant. The major portion of my client's parcel is flat and level. There is no pitch between the stream and the surrounding area. Accordingly, any increase in the flow above the banks would result in a flooded plain situation of adjacent property, rendering it unuseable to Sun Enterprises, Ltd. The brook itself varies in width and depth but on an average is approximately 3 feet from bank to bank with generally less than one foot in depth.

The Brown Brook has been one of two streams which carries the natural drainage waters from a basin of several hundred acres into the New York City reservoir system. That basin is formed by three ridges, one across the north and one each on the east and west. The other brook is the Plum Brook. As I have observed, the plan sought for approval includes not only the natural basin by general entry into the Brown Brook but also lands to the north, beyond the natural ridge. Apparently, a developer not joining in this application

will be benefited by the plan in that it appears that the sewage from the proposed Greenbriar developement to the north will be processed by the Heritage Hills sewage plant and deposited into the Brown Brook as well.

As I understand the application, there is planned to be a golf course from which there will be nutrient run-off and storm water channelled, piped, directed and deposited in the Brown Brook as well as sewage effluent in addition to the natural run-off which presently floods the area when there is any precipitation of any substance. The removal of trees and turf replaced by paving, housing units and roads will increase storm water velocity.

Our preference is not to deny the use of a stream. However, it is requested that the Plum Brook, a larger, faster flowing brook where Sun Enterprises, Ltd. has no objections, be used. As differentiated from the Brown Brook, the Plum Brook has banks that vary from [illegible] feet in width, the land on either side of the brook is pitched to the stream, and the stream itself has a drop as it traverses the Sun Enterprises, Ltd. (formerly Voorhis Farm) parcel some 4,000 feet of 320 feet to 260 feet. This 60 foot elevation is fairly consistent throughout the 4,000 feet the Plum Brook traverses the Sun Enterprises parcel and it is obvious it has a far greater capacity to handle the surges as well as the continuous additional flow. The Brown Brook does not.

As a third alternative on behalf of my client, I offered to set aside one acre of Sun Enterprises, Ltd. property along the west side of Route 100 in the southern most corner of my client's property for development of a sewage treating plant and offered an easement to permit the developer to put pipe alongside the area of the Brown Brook to carry the sewage and storm water to the plant. This would avoid the flooding and destruction of my client's flat lands and provide this proposed developer with a sewage plant site away from his own development. The developer has never acted on this offer.

I would also respectfully point out that the flooding is not consistent with the enabling acts of the Town of Somers under which this development has been authorized, namely the preservation of the existing water bodies and wetlands. In fact, the proposed plan cannot

possibly preserve them but will ultimately destroy the exising Sun Enterprises, Ltd. wells and the ten acre reservoir along the Brown Brook that is vitally needed for the future development of the 500 acres of Sun Enterprises, Ltd. property and the Town of Somers. Further, I understand that the New York State guidelines do not permit the use of intermittent streams for the deposit of sewage effluent and/or storm water drainage "...except in an emergency." I would respectfully direct your attention to the two alternatives which would be provided for the use of this proposed development on my client's property which would produce the desired result for this developer without deposits into the Brown Brook which would effectively deprive my client from using his own property.

Although I have directed your attention only to the quantity of water to be deposited, 700,000 gallons daily from the sewer plant, I have reservations, as does my client, about the quality of the water to be deposited, and its effect on his wetlands, flat areas, wells and reservoir, and in the stream whether it be the Brown Brook as proposed, or the Plum Brook. I would re-direct your attention to the fact that not only is there going to be effluent with accompanying nutrient, but further there will be run-off from two golf courses having a greater density of fertilizers than normal residential developments, and hence additional amounts of nutrients. The placing of such nutrient-rich water into the Plum Brook would have a far less detrimental effect on my client's use of his own land than in the Brown Brook because of the different terrain features of the two brooks above noted. We will not be able to have a scientific example of the deterioration of the purity in the water until we have; in fact, received and sampled the water when the development is completed. We are, however, prepared with the scientific data as to the flow in the Brown Brook and in the Plum Brook as it is related to the quantity of water in the event that the applicant's proposal (for reasons unknown to me) might possibly be approved by the appropriate New York State departments and their subdivisions and ultimately be a permitted use.

Thanking you for your kind attention and interest in this matter, I am,

Very truly yours,

William J. Florence, Jr.

WJF/ac

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the

Application of HENRY PAPARAZZO and CURTIS McGANN (HERITAGE HILLS) for the acquisition of a source of water supply by the development of wells to ultimately supply 1.2 million gallons per day and the construction of a water supply and distribution system to provide service to a planned residential community consisting of approximately 3,000 living units known as Heritage Hills of Westchester County, for the construction of a dam approximately 20 feet high to create a pond having an area of approximately 1.6 acres on an unnamed tributary, known locally as Brown Brook, of the New Croton (Muscoot) Reservoir which is designated H-31-P-44-18 and which has been classified C(T), for the construction of a sewage effluent discharge structure, and for relocation of approximately 650 feet of the so-called Brown Brook to build a sewage treatment facility.

Water Supply Application No. 6284

TRANSCRIPT OF PROCEEDINGS in the above-entitled matter at a hearing held by the New York State Department of Environmental Conservation at the Town Hall, Town of Somers, Westchester County, New York, on Thursday, October 4th, 1973, commencing at 1:00 P. M.

PRESIDING: WILLIAM J. DICKERSON, JR., Hearing Officer.

PAULINE E. WILLIMAN — CERTIFIED SHORTHAND REPORTERS — THOMAS P. TOLEY

EXHIBIT N

THE WITNESS: Thank you, sir.

I'm going to run before someone else calls me.

(Whereupon the witness was excused.)

MR. DICKERSON: Mr. Blasi?

MR. BLASI: At this point the applicant rests.

MR. DICKERSON: Thank you. I'm going to take a very brief break, about five minutes. Before we do, I'm going to ask Mr. Vazzana and Mr. Florence if they want to consider who's going to go first.

MR. VAZZANA: Suppose Mr. Florence does.

MR. DICKERSON: O.K.

(Whereupon a short recess was taken.)

MR. DICKERSON: Ladies and gentlemen -- ladies and gentlemen, we have concluded Phase I. Shall we continue, Mr. Florence?

MR. FLORENCE: Well, if it please Mr. Dickerson, I have a request to make at this time and it deals with the scope of this hearing and the scope of my objection and the limitations to

my objection to some portion of the application and not to others.

My client's objection is not directly involved in the matters which are set forth in the notice of hearing. Succinctly stated, my client's objection is to the placement itself, the physical placement of the sewage plant upon the premises as it's proposed in the -- inferentially and indirectly on some of the exhibits which are involved in this hearing.

We also have some concern as to the extent of the aquifer from which water would be drawn to the extent that it might affect the water supply presently on his premises. However, I think that that issue would fairly -- has been fairly resolved and discussed at this hearing, and the purpose of my request at this time is to do either of two things:

Either to expand the hearing with appropriate notice to encompass, pursuant to the provisions under the Environmental Conservation Law, both as they existed prior to September 1st, 1973 and as they have been amended as of that date, or to

schedule another separate and distinct hearing which would deal with the location of this new facility.

Now, as I read the law, the hearing is a matter of the discretion of the Commissioner of the Department of Environmental Conservation or his representatives or agents as the language so notes, both before and after September 1st, 1973. But it seems to me that on reflection as to the issues that are noted to be in this hearing, that the placement of that plant which is the subject of our written objection are matters which are academic or derivative to the placement itself. I refer specifically to the relocation of the stream and the placement of the outflow structure.

I have, for my client, expert testimony dealing with that which I would be ultimately prepared to produce as it would affect the placement of a sewage effluent facility or sewage treatment plant on the property of the applicant.

I must confess to a fair amount of ignorance to both the pre-existing and the new law in my bumbling about trying to see just the extent

or the scope to which this hearing has found itself to be defined, and I would at this time ask either the representatives of the Department of Environmental Conservation if they have any information which would help solve and resolve this question in my mind and pending their answers on that, I would then make other suggestions if I could, Mr. Dickerson.

MR. DICKERSON: No. 1, the expansion of the hearing?

MR. FLORENCE: Or their location to have a hearing in relation --

MR. DICKERSON: Or not, to put it bluntly, a hearing under the SPDES procedure.

MR. FLORENCE: And limiting it and my area of interest as to the placement of the plant itself, and I draw from --

MR. DICKERSON: May I refine "placement" slightly?

MR. FLORENCE: The location.

MR. DICKERSON: As to drainage basis, as to --

MR. FLORENCE: Just the deposits of effluent really.

MR. DICKERSON: Effect of the relocation of the stream or the exact utility area?

MR. FLORENCE: The objection is to the deposit of effluent upon the -- into the stream which traverses the property and I think that because of the deposits, the deposit is a function or a derivative of the placement of the plant as I understand what testimony has been given by the experts who have already testified.

I refer to Section 17-0303, 17-0701, 17-0505 and as they are amended, as authority for, No. 1, the hearing for the issuance of permits for the installation and operation of disposal plants or systems together with the construction, and 0505 indicates that such a thing is prohibited without this, what we've been referring to as SPDES permit. 0701 makes unlawful the discharge of effluent into the New York State waters and then relates in subdivision (b) construction of such a plant and that is my primary concern. I've indicated that both in my opening statement and even before my opening statement in my -- in the

writings that we were required to produce to the Commissioner and his agents in order to even have this underlying hearing. So that I guess I have to say that the hearing is -- doesn't encompass all of the things of which we complained in writing and I also say that, as I read the law, it appears that a hearing is appropriate in relation to the things for which we do complain.

MR. DICKERSON: That's having to do with Chapter 801 of the Laws of 1973.

MR. FLORENCE: Yes.

MR. DICKERSON: Thank you.

(Continued on page 1157)

MR. FLORENCE: And then I'm not prepared to go on until I know.

MR. DICKERSON: I am going very shortly, while I start looking for something in here, to take a break. Shall we use the next 10 minutes for solemn meditation, if I can use those words?

MR. FLORENCE: Existential meditation.

MR. DICKERSON: Mr. Vanzana, do you have something to say? Do you want a moment or two to react?

MR. BLASI: Yes, that would be nice.

MR. DICKERSON: Let's take a break for about 10 minutes.

(Short recess.)

MR. DICKERSON: We have a request which is tantamount to a motion. We're going to entertain comments from various parties but especially the attorneys present.

Mr. Blasi, I'll hear your reply comment.

MR. BLASI: Mr. Kuehner, this application was filed on April 26, 1973 with the Department of Environmental Conservation. As a result of that filing, and I think in accordance with what occurred

MR. DICKERSON: Mr. Alexander?

MR. ALEXANDER: No, I have no statement to make with respect to Mr. Florence's request.

MR. DICKERSON: This has generally been a legal point. Does anybody have any --

(There was no response.)

MR. DICKERSON: O.K. I have taken the following step: I've called my superior in Albany. I have requested a determination be made by tomorrow if possible as to whether a commitment may be made in the name of the Department to hold a SEQRA hearing. This information will not be available before tomorrow. If the information is not available by the time we have an hour or so of our hearing tomorrow, I will specifically rule on your motion or request, Mr. Florence. I've got to wait time for word from Albany if a commitment may be made in the name of the Department.

In the interim, I would like to proceed, reserving your rights, with other parties who care to make statements for the rest of the afternoon and possibly for the first hour tomorrow morning. We will use as much tomorrow, the rest of today and tomorrow

as we can. At that point I'd like to let the matter drop as an open matter if I may. I may receive authorization to make a commitment in the name of the Department which will bring these proceedings to an end which will be in the near future. If I don't, I will make my rulings on the subject tomorrow if that is satisfactory to all parties.

MR. BLASI: I don't see any other alternative.

MR. DICKERSON: In the meantime we've got at least a half an hour if we can use it. Any objection to continuing at least until tomorrow morning, Mr. Florence?

MR. FLORENCE: I have no objection if this will keep the thing moving.

MR. KIPP: Let's get it over with.

MR. DICKERSON: Mrs. Gaia?

MRS. GAIA: Mrs. Port has a statement.

MR. DICKERSON: Mrs. Port will be speaking for you both then?

MRS. PORT: Well, my husband was writing a statement and I would rather --

MR. DICKERSON: Would you rather --

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter

of

the Application of HENRY PAPARAZZO and CURTIS McCANN (HERITAGE HILLS) for the acquisition of a source of water supply by the development of wells to ultimately supply 1.2 million gallons per day and the construction of a water supply and distribution system to provide service to a planned residential community consisting of approximately 3,000 living units known as Heritage Hills of Westchester County, for the construction of a dam approximately 20 feet high to create a pond having an area of approximately 1.6 acres on an unnamed tributary, known locally as Brown Brook, of the New Croton (Muscoot) Reservoir which is designated as D-31-P-44-13 and which has been classified C(T), for the construction of a sewage effluent discharge structure, and for relocation of approximately 650 feet of the so-called Brown Brook to build a sewage treatment facility.

Water Supply Application No. 6284

TRANSCRIPT OF CONTINUED PROCEEDINGS

in the above-entitled matter at a hearing held by the New York State Department of Environmental Conservation, at the Town Hall, Town of Somers, Westchester County, New York, on Friday, October 5th, 1973, commencing at 10:30 o'clock A. M.

PRESIDING: WILLIAM J. DICKERSON, JR., Hearing Officer.

APPEARANCES: (As heretofore noted.)

P R O C E E D I N G S

MR. DICKERSON: Ladies and gentlemen, this as I think everybody is aware, is a continuation of the hearing before the Department of Environmental Conservation in the matter of the application of Henry Paparazzo and Curtis McCann under Water Supply Application No. 6284 and related applications, for the water supply, the construction of a dam, the relocation of a classified stream and the construction of a sewage effluent discharge structure to service the project generally known as Heritage Hills of Westchester.

At the time we closed last night, we had two requests, motions if you will, made to the Hearing Officer and the first being that the hearing be adjourned, a new notice published and the hearing continue in an expended fashion to consider the effects of Chapter 801 of the Laws of 1973, otherwise known as SPDES. This request is denied.

I can make no statement as to the -- second request and, in effect, a guarantee that there would be a hearing under SPDES. The law became effective September 1st, but tha -- I used the words "enabling rules and regulations" yesterday, that's

not quite proper -- perhaps the operative rules and regulations with which this law would be administered have not been promulgated yet. It is my personal understanding that they are at best in draft form at this time. The applicant has stipulated that he would have to make an application or acknowledge -- let me say acknowledge that he would have to make an application for the SPDES permit, the discharge permit.

A casual reading of the SPDES law indicates that a hearing may be held and that's as far as I can take it. I can no way guarantee that a hearing will be held or will not be held nor would I even guess as to whether there would be a probability of such event. This is something that is still to be done in the future when the rules are published, the applications are made, the legal notices required in the law are published and then a decision would be made at that time.

I think the members of the bar here are aware of the problem due to the effective date of the SPDES law as of September 1st, 1973, which occurred after the notice for these proceedings had been published.

[redacted] And with that statement, we're going to continue with this hearing and hear the issues before us; that is, the water supply, construction of the dam, the relocation of a classified stream. The main purpose of this is to build a sewage treatment plant but the issue is the relocation of the stream for that purpose, but the relocating of a classified stream and the disturbance of the bed and banks of the classified stream for the construction of the sewage effluent discharge structure.

MR. BLASI: Mr. Dickerson, may I make a statement for the record please if you are finished, but don't let me interrupt you.

MR. DICKERSON: I've got a couple housekeeping chores but --

MR. BLASI: All right, whenever you're ready, sir.

MR. DICKERSON: They are more in line with continuing with the hearing for various parties. So Mr. Blasi?

MR. BLASI: It's a very brief statement, sir.

In reference to the statement which

the Examiner has just made, the applicant wishes to note for the record that the application under Chapter 801 of the Laws of 1973 referred to as SPDES is -- as SPDES.

MR. BLASI: Yes, sir. -- is being or is in the process of preparation and filing with the appropriate agency.

(Continued on page 1185)

APR 10 1974
#2127

827

New York State Department of Environmental Conservation
Albany, N. Y. 12201

Henry L. Diamond,
Commissioner

April 5, 1974

H. + H. Land Corp.
NY0026891

Meyer Scolnick, Director
Enforcement and Regional Counsel Division
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10007

Dear Sir:

This letter serves to inform you that the State of New York, Department of Environmental Conservation intends to certify, pursuant to Section 401 of the Federal Water Pollution Control Act Amendments of 1972 (the Act), the discharge(s), listed below. This action is a result of the recently developed procedures regarding a "Joint Public Notice" to be issued by EPA in conjunction with NYSDEC. The "Joint Public Notice" indicates both EPA's receipt of a complete NPDES application and NYSDEC's intention to certify under Section 401 of the Act.

Therefore, having previously been requested by the Environmental Protection Agency to act on subject application(s) pursuant to Section 401 of the Act, and upon receiving no indication from EPA that either a public hearing is to be held, or that any significant comments have been received regarding subject discharge(s), the State of New York, Department of Environmental Conservation will, subsequent to the comment date indicated in the notice, issue the required certification(s).

The following list of discharges, having been previously designated by EPA as effluent limiting, is being forwarded for your use in a joint public notice issuance:

1. H and H Land Corporation, Somers (T),
   Westchester County, NY 0026891
   Effluent limitations and monitoring requirements that would normally become part of the certification, as required under Section 401a(1) of the Act, were forwarded to you on March 21, 1974.

   However, subsequent to submitting the above materials, the Department has determined that the following additions and changes to the effluent limitations and monitoring requirements are required.

EXHIBIT C(1)

A77

In addition to the effluent limitations previously submitted, it is recommended that the following effluent limitations also be made part of the draft permit.

Effluent Limitations

Settleable solids	0.1 ml/l
Residual chlorine	≥0.5 mg/l and ≥3 lbs/day
Phosphorous	0.5 mg/l and 3 lbs/day

The following monitoring requirements will take precedence over those previously submitted on March 21, 1974.

Parameter	Frequency	Sample Type
Total Flow, MGD	Continuous	---
BOD_5, mg/l	1/week	6 hr. composite
Settleable solids, ml/l	1/day	Grab
Suspended solids, mg/l	1/week	6 hr. composite
pH	1/day	Grab
Residual chlorine, mg/l	1/day	Grab
Phosphorous	1/week	Composite
Fecal Coliform, N/100 ml	1/week	6 hr. composite
Temperature °C	1/day	---
D.O.	1/week	6 hr. composite
Ammonia	1/week	6 hr. composite

Attached is a copy of the New York State Pollutant Discharge Elimination System (SPDES) draft permit that was a result of H and H Land Corporation's filing of a SPDES application. You may find the information contained therein helpful in the development of the NPDES permit.

Attached are information copies of party-in-interest letters that were received subsequent to the publishing of a notice of application for a permit to discharge under provisions of the State Pollutant Discharge Elimination System.

In this connection we have reviewed the hearing record relative to the applicant's water supply application and have concluded that most of the issues raised by the parties-in-interest were covered and addressed to during the hearing. However, particular reference is made to a letter, dated January 11, 1974, to the State of New York, Department of

Environmental Conservation, from W.J. Florence, Jr., in behalf of Sun Enterprises, Ltd., in which is indicated that expert testimony is availabe to be produced as to the effect of subject discharge on Brown Brook.

If you have any questions, do not hesitate to contact us.

Very truly yours,

William L. Garvey, P.E.
Chief, P.D.E.S. Permit Section
Division of Pure Waters

cc: Mr. Seebald
Mr. Krug
Mr. Harrison, Region 3

WESTCHESTER ROCKLAND NEWSPAPERS

Circulation Breakdown by Community

Net Paid ABC Circulation, from Publisher's Statements 26 weeks ending March 31, 1974

	City Households*	TOTAL paid Circulation	CITY Circulation	Retail Zone Circulation	All Other Circulation	EFFECTIVE BUYING INCOME–1972*
Yonkers HERALD STATESMAN	73,600	46,741	39,954	5,117	1,670	$1,065,739,000
Mount Vernon DAILY ARGUS	26,300	15,961	13,176	1,666	1,119	$340,666,000
New Rochelle STANDARD-STAR	25,800	18,635	15,848	2,341	446	$460,503,000
White Plains REPORTER DISPATCH	19,000	48,831	11,751	35,919	1,161	$325,790,000
Port Chester DAILY ITEM	9,000	15,331	5,596	9,458	277	$128,551,000
Tarrytown DAILY NEWS	6,500	6,218	4,371	1,705	142	$103,904,000
Ossining CITIZEN REGISTER	6,900	8,977	4,373	4,479	125	$103,231,000
Mamaroneck DAILY TIMES	6,100	9,401	4,376	4,747	278	$115,706,000
Peekskill EVENING STAR	6,300	13,844	3,873	8,129	1,842	$81,329,000
Rockland JOURNAL-NEWS	5,700	47,233	3,420	43,518	295	$1,098,815,000
Total in Cities	185,200		106,738			$3,824,234,000
Remainder in Market	219,700			117,079	7,355	$3,641,367,000
TOTAL MARKET	404,900	231,172				$7,465,601,000
(Detailed circulation breakdown inside and back cover)		*Sales Management, 7/23/73				
NYACK SUNDAY		26,510	2,019	24,313	178	

Retail and Classified Advertising Rates

INDIVIDUAL & COMBINATION RATES

for the Westchester Rockland Newspaper Group of Dailies and the Bronxville Review Press — Reporter (Thursday) available on request.

CONDITIONS FOR GROUP ADVERTISING

All advertisements must be identical in size and copy and appear in all the newspapers within a seven-day period.

westchester rockland newspapers One Gannett Drive, White Plains, N.Y. 10604

Represented by Story & Kelly-Smith, Inc.

Members: The Gannett Group

EXHIBIT E

Circulation Breakdown of the WESTCHESTER ROCKLAND NE

Corresponding to 27 weeks ABC Publisher's Statement for period ending March 31,1974. Listings represent an aver

CITIES	Yonkers Herald Statesman	Mount Vernon Argus	New Rochelle Standard-Star	White Plains Reporter Dispatch	Port Chester Item	Tarry-town News	Ossining Citizen-Register	Mamaro-neck Times	Peekskill Evening Star	TOTAL
MOUNT VERNON	16	13,943	3	5	1					13,968
NEW ROCHELLE	4	5	16,445	58	2	1	1	138		16,654
PEEKSKILL	1			102	1		6		4,185	4,295
RYE	1		1		3,193		1	129		3,325
WHITE PLAINS	20	9	14	12,374	11	8	6	6	7	12,455
YONKERS	40,823	128	5	106		2	2	1		41,067
TOWNS and VILLAGES										
BEDFORD Town Total		1	7	3,044	2	1	1	1		3,052
Mt. Kisco (a)		1	2	1,341	2	1	1	1		1,349
Balance				1 703						1,703
CORTLANDT Town Total	3		1	128		2	1,862		4,822	6,818
Buchanan							25		602	627
Croton	2		1				1,604		77	1,684
Balance	1			128		2	233		4,143	4,507
EASTCHESTER Town Total	1,330	1,341	460	2,265	2	2	2	4	2	5,408
Bronxville	430	160	3	9				1		603
Tuckahoe	522	353	26	136						1,037
Balance	378	828	431	2,120	2	2	2	3	2	3,768
GREENBURGH Town Total	4,104	4	9	9,325	5	6,141	6	3	6	19,603
Ardsley	339			517		1				857
Dobbs Ferry	1,655			2		31	1			1,689
Elmsford	3	1	2	867	3	5	2		2	885
Hastings	1,889	1	4	1		2				1,897
Irvington	55			1		1,224	1			1,281
Tarrytown (b)	3	2	3	6	2	4,507	2	2	1	4,528
Balance	160			7.931		371		1	3	8,466
HARRISON Town Total				1,290	2,949		1	36		4,276
LEWISBORO Town Total	1			718						719
MAMARONECK Town Total	1	3	202	3	50	2	1	9,072		9,334
Larchmont		1	97		2		1	1,716		1,817
Mamaroneck (c)	1	2	11	3	48	1		4,425		4,491
Balance			94			1		2.931		3,026
Mt. PLEASANT Town Total (d)	2	1	3	5,246	2	117	114			5,485
Pleasantville		1		1,372	1	1				1,375
Balance	2		3	3.874	1	116	114			4,110
NEW CASTLE Town Total (e)				1,343			320			1,663
NORTH CASTLE Town Total				1,439					1	1,440
NORTH SALEM Town Total	1		1	419		2			1	424
OSSINING Town Total	2		1	5	1	10	6,705	1		6,725
Ossining (f)			1	2	1	6	4.494	1		4,505
Briarcliff (g)	2			3		3	1,338			1,346
Balance						1	873			874

NOTE: (a) Includes part of Mt. Kisco in New Castle Town; (b) Includes North Tarrytown village in Mt. Pleasant Town; (c) Includes part of Mamaroneck Village lying in Rye town; (d) Does not include North Tarrytown Village (see b) nor part of Briarcliff Manor Village (see g); (e) Less the part of Mt. Kisco lying in New Castle Town (see a).

SPAPER GROUP by Cities, Towns and Incorporated Villages

Jay in the period, March 15, 1974, with some figures subject to slight reductions for copies later deducted as returns.

TOWNS and VILLAGES (Continued)	Yonkers Herald Statesman	Mount Vernon Argus	New Rochelle Standard-Star	White Plains Reporter Dispatch	Port Chester Item	Tarry town News	Ossining Citizen-Register	Mamaro-neck Times	Peekskill Evening Star	TOTAL
PELHAM Town Total		340	1,951							2,291
North Pelham		242	730							972
Pelham		46	290							336
Pelham Manor		52	931							983
POUNDRIDGE Town Total				167	1					168
RYE Town Total (h)	3	2	2	6	7,562		1	8		7,586
Port Chester	3	2	2	4	5,729		1	5		5,747
Balance				2	1,833			3		1,839
SCARSDALE Town Total	5	3	55	2,529	1	1		6		2,600
SOMERS Town Total				1,288					67	1,355
YORKTOWN Town Total	2			2,180		2	80		3,623	5,887
WESTCHESTER COUNTY	46,319	15,780	19,155	44,040	13,783	6,293	9,109	9,405	12,714	176,598
ROCKLAND COUNTY JOURNAL-NEWS	(See Back Page for Circulation Breakdown)									49,235*
PUTNAM CO. Total	6	3	1	5,728	1		1		1,816	7,556
Carmel Town	4		1	3,096			1		524	3,626
Kent Town				1,164						1,164
Patterson Town				390						390
Phillipstown				36					533	569
Putnam Valley Town				148					757	905
Southeast Town	2	3		894	1				2	902
Brewster	2	1		617	1				2	623
Balance		2		277						279
DUTCHESS CO.				123						123
BRONX COUNTY	945	901	12	7			2	4	4	1,875
FAIRFIELD CO. (Conn.) Total	4	4	8	6	1,640	2		5		1,669
Greenwich	4	1	1	2	1,629					1,637
Balance		3	7	4	11	2		5		32
SUB-TOTAL	47,274	16,688	19,176	49,904	15,424	6,295	9,112	9,414	14,534	237,056*
All Other–Counties and States										
MANHATTAN CO.	508	10	14	666	4	9	5	8	7	1,231
KINGS CO.			1	2		1	1		1	6
Under 25 Copies	89	11	17	45	11	19	12	17	28	249
MISC. STATES	141	41	84	103	69	58	40	47	95	678
GRAND TOTAL	48,012	16,750	19,292	50,720	15,508	6,382	9,170	9,486	14,665	239,220*
RECAPITULATION										
TOTAL N.Y. STATE	47,867	16,705	19,200	50,611	13,799	6,322	9,130	9,434	14,570	236,873*
TOTAL CONNECTICUT	13	5	11	22	1,643	6	1	5	1	1,707
TOTAL MISCELLANEOUS	132	40	81	87	66	54	39	47	94	640

NOTES–Continued: (f) Does not include Sing Sing Prison. (g) Includes part of Briarcliff Manor Village in Mt. Pleasant Town (h) Does not include Rye City (listed separately under cities) and part of Mamaroneck Village in Rye Town.

* Rockland County figures shown only in totals. (See back page for Circulation breakdown.)

CIRCULATION BREAKDOWN
OF

THE JOURNAL-NEWS

(Rockland County, N.Y.)

Circulation listings are GROSS and represent an average day, March 15, 1974, in the communities listed below with some figures subject to slight reduction for copies later deducted as returns.

March 15, 1974 – Daily
March 17, 1974 – Sunday

Clarkstown Town	Daily	Sunday
Bardonia	500	284
Centenary	30	25
Central Nyack	374	227
Congers	1,316	826
Nanuet	2,560	1,328
New City	5,823	3,118
Rockland Lake	22	15
Upper Nyack	382	213
Valley Cottage	1,448	920
West Nyack	1,856	984
	14,311	7,940

Orangetown Town		
Blauvelt	1,142	649
Grand View-on-Hudson	84	38
Nyack	1,834	1,145
Orangeburg	1,231	681
Palisades	184	113
Pearl River	3,619	1,907
Piermont	373	254
South Nyack	618	335
Sparkill	345	203
Tappan	982	574
	10,412	5,899

Stony Point Town		
Stony Point	2,265	1,384
Tompkins Cove	151	92
	2,416	1,476

Ramapo Town	Daily	Sunday
Airmont	259	144
Hillburn	139	80
Hillcrest	1,518	782
Monsey	4,162	2,120
Pomona	777	466
Sloatsburg	590	408
Spring Valley	5,806	3,425
Suffern	3,232	1,856
Tallman	461	288
Viola	29	12
	16,973	9,581

Haverstraw Town		
Garnerville	1,244	828
Haverstraw	1,137	602
Mt. Ivy	725	523
Thiells	547	313
West Haverstraw	1,125	703
	4,778	2,969

Balance in County	36	33
Total Rockland County	48,926	27,898
Total Orange County	84	62
Tuxedo Town	84	62
All Others	225	125
TOTAL	49,235	28,085

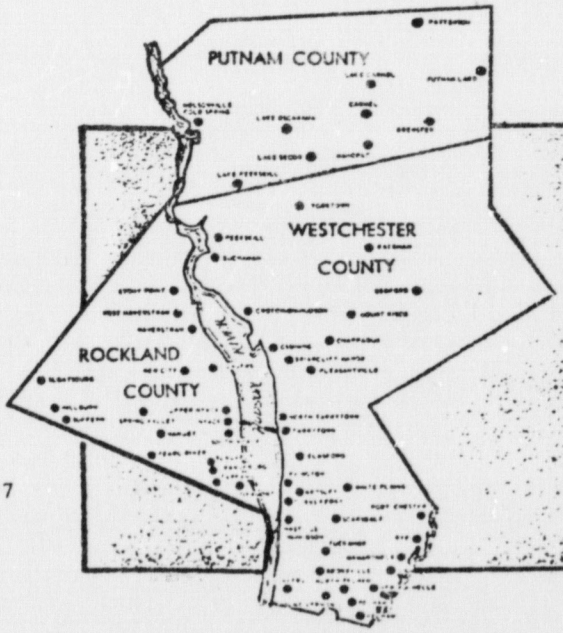
BRONXVILLE REVIEW PRESS and REPORTER
(Thursday)

CIRCULATION: ABC Publisher's Statement for 26 weeks ending March 31, 1974: 3,106

BRONXVILLE, NEW YORK

Population	6,800
Households	2,600
Effective Buying Income	$63,225,000
Per Household Income	$24,317
Total Retail Sales	$37,765,000

Source: Sales Management, 7/23/73



Greater Westchester-Rockland Market* Highlights

Population	1,275,000
Households	404,000
Effective Buying Income	$7,465,601,000
Per Household Income	$18,348
Total Retail Sales	$3,921,776,000

Source: Sales Management 7/23/73
* Includes Putnam County, N.Y. and Greenwich, Conn.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

Plaintiffs,

-against-

RUSSELL E. TRAIN, as Administrator of the U.S. Environmental Protection Agency, ET AL., THE STATE OF NEW YORK, ET AL., THE TOWN OF SOMERS, ET AL., and HERITAGE HILLS OF WESTCHESTER, ET AL.,

Defendants

75 Civ. 68 (DBB)

AFFIDAVIT

- x

STATE OF NEW YORK)
) s.s.:
COUNTY OF WESTCHESTER)

RAUL CARDENAS, JR., being duly sworn, deposes and says:

1. I hold a Ph.D. and am an Assistant Professor of Civil Engineering at the Polytechnic Institute of New York, and have previously submitted my curriculum vitae to this Court.

2. On Thursday afternoon, February 27, 1975, I directed Leo Fung, my laboratory and field chemist to take samples of the liquid effluent reported flowing from the sewage discharge pipe at Route 202 into Brown Brook in the Town of Somers.

3. Samples were taken and returned to the laboratories of Environmental Assessment Associates for analysis.

4. In the short period of time allotted, only a limited number of tests could be made. Moreover, some tests such as the Total Coliform Test by the Multiple Tube Fermentation Method (MPN Test) require 48 hours for a presumptive test and 72 hours for a confirmed test. The Biochemical Oxygen Demand Tests (BOD tests) require five days incubation. Therefore, my analysis of the effluent samples and receiving stream waters is not complete.

5. Samples were taken (a) of the effluent itself from the pipe outfall and (b) of the stream water upstream in order to determine the background values of the receiving waters.

6. My tests reveal that the background value for ammonia-nitrogen (NH_3) in Brown Brook yesterday was approximately 0.27 ml/L at a point identified as sample site No. 1 on the field sketch of sampling sites in my report already before the Court with my affidavit of December 2, 1974. The ammonia-nitrogen in the waste water discharge effluent is found 0.70 and 0.79 ml/L respectively collected at 1 P.M. and 3 P.M.

7. This three-fold difference in ammonia-nitrogen mixes with the receiving waters which contain microorganisms which serve to convert the NH_3 to nitrate (NO_3) and in the process of this biochemical reaction consume 4.5 times the weight of NH_3 in oxygen.

8. Since the dissolved oxygen in Brown Brook at its upper stretch below Route 202 is at a critical level, this further removal of oxygen can only serve to further stress the oxygen supplies.

9. Moreover, the nitrogen oxidized in this fashion serves to stimulate plant growth to include algae which further adversely affects these waters.

10. The addition of nitrates and phosphorous (for which my tests are not complete) show that enrichment has begun and, if continued at the values found in my tests of the present effluent, will lead to eutrophication. It is only a matter of time. The eutrophication will result in destruction of the fish and other oxygen dependent biota and the subsequent changes will deteriorate water quality further.

11. The nutrient levels tested appear low at present but are sufficient to begin the enrichment process.

12. Moreover, the field test conducted yesterday by Leo Fung for chlorine by the Orthotolidine (ÔT) method showed a chlorine content of about 0.1 ml/L at approximately 1 and 3 P.M. My laboratory test by more precise analytical methods (Iodometric method) showed a value of 0.14 ml/L. At the immediate discharge site, this level of chlorine would be toxic to fish. Beyond the mixing zone, this level probably is not toxic with the appropriate dilution.

13. Finally chloride values indicated an elevation of 2 ml/L over background levels. This substantiates the fact that some sewage or other waste waters are being added to the treatment process, but that the volume of such is rather low.

14. Other test results are pending and may require as much as six days for completion.

15. The incomplete findings show that levels are above ambient levels and are sufficient to initiate the enrichment process, although not yet at the higher level anticipated once the waste producing facilities of the first 115 condominium units are in use. If the effluent continues,

the progression to irreparable harm has begun, and it is only a matter of time before it will become irreversible.

WHEREFORE a preliminary injunction should be granted at once to preserve the natural balance of the Brown Brook - No Bottom Marsh ecosystem.

Raul Cardenas, Jr.

Sworn to before me this
28th day of February, 1975.

Notary Public

NICHOLAS ADAMS ROBINSON
Notary Public, State of New York
No. 3510375
Certified in Westchester County
My Commission Expires March 30, 1975

//

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

SUN ENTERPRISES, LTD., SOUTHERN NEW YORK FISH AND GAME ASSOCIATION, INC., LYMAN E. KIPP, RICHARD E. HOMAN, NO BOTTOM MARSH and BROWN BROOK,

Plaintiffs,

-against-

RUSSELL E. TRAIN, as Administrator of the U.S. Environmental Protection Agency, ET AL., THE STATE OF NEW YORK, ET AL., THE TOWN OF SOMERS, ET AL., and HERITAGE HILLS OF WESTCHESTER, ET AL.,

Defendants.

- -x

75 Civ. 68 (DBB)

AFFIDAVIT

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

RAUL CARDENAS, JR., being duly sworn, deposes and says:

1. I hold a Ph.D in environmental sciences and am an assistant professor at the Polytechnic Institute of New York. My curriculum vitae is attached as Exhibit A to my affidavit sworn to December 2, 1974. I make this affidavit to record the facts and findings from my analysis of effluent samples taken from the waste water discharge pipe and receiving waters located under Route 202 on Brown Brook and servicing the housing development known as Heritage Hills of Westchester. This affidavit is submitted in further support of plaintiffs' application for a preliminary injunction.

2. Under my direction, samples of effluent were taken from the discharge pipe when it was in use on April 11, 1975. Samples had also been taken of discharges occurring on the previous day. The analysis of those samples yielded results which were substantially the same for both days. They are set forth separately, identified by date next to each sample site, in the summary of my findings attached hereto as Exhibit A.

3. The sample sites listed in the annexed Exhibit A are the same locations as those described in my report which is annexed to my affidavit sworn to December 2, 1974.

4. The content of the effluent sampled on April 11, 1975, further corroborates the conclusions which I have set forth in my previous affidavits that the levels in the effluent of ammonia (as nitrogen), nitrate (as nitrogen) and phosphorous (as orthophosphate) are far in excess of levels sufficient to protect the biota and drinking water quality from irrevocable harm from eutrophication and related consequences.

5. More specifically, the samples in Exhibit A hereto show ammonia concentrations 10 to 20 times that present in the receiving waters, nitrate 3 to 10 times the levels normally present in the receiving waters, and phosphorous almost 150 times that of the receiving waters.

6. All these three concentrations exceed the effluent limitations of the NPDES permit issued for this discharge point.

7. Chlorine levels are very elevated. The 4.16 mg/l found exceed the limits allowed in the NPDES permit and are at levels sufficient to kill biota in the immediate receiving water.

8. The chemical oxygen demand (COD) in the effluent is twice as enriched as that of Brown Brook, and reflects the fact that the effluent contains organic compounds which will increase the probability of eutrophication.

9. Chloride levels, normally an indicator of wastewater, are from 2 to 2.5 times that of the receiving waters. This could suggest a high dilution of any wastes undergoing treatment and is consistent with the reported small number of occupants in units in Heritage Hills of Westchester buildings.

10. Finally, the data shows a very severe suspended solids load discharged into the natural systems. This load will settle out in the marsh area south of Route 202 and adversely impacts on the natural systems.

A90

11. If allowed to continue, the present levels of enrichment and siltation indicate that deterioration of conditions for the fish, wildlife, other biota and of the drinking water quality, will accelerate markedly.

Raul Cardenas, Jr.

Sworn to before me this
17th day of April, 1975.

Notary Public

NICHOLAS ADAMS ROBINSON
Notary Public, State of New York
No. 5512075
Certified in Westchester County
My Commission Expires March 30, 1977

ENVIRONALYSIS Laboratories
SUN ENTERPRISES, Inc.
Date of sampling 4/11/75
Time of sampling 9:02-9:24 am
Weather: Sunny, clear
Sample Sites:

1. Sample site 1, upstream
3A Discharge Effluent
3B Mixing Zone (5 ft downstream of discharge)
3C 150 feet downstream of discharge

SUMMARY OF FINDINGS

Site No.	COD mg/l	NH_3-N mg/l	NO_3-N mg/l	Chlorine mg/l	Chloride mg/l	Total Susp-Solids mg/l
1, 4/11	9.2	0.24	0.11	0.0	10.0	1.6
3A 4/11	19.9	2.90	0.36	4.16	27.3	44.0
3B 4/11	10.5	0.98	0.08	0.0	10.7	5.8
3C 4/11	9.4	0.26	0.06	0.0	10.7	1.8
3A 4/10	16.2	6.41	1.02	2.08	24.2	47.0

Site No.	pH	DO mg/l	DO % Sat'n	Ortho-Phosphorous mg/l Total	Diss.	Partic.	Temp. °C
1	7.3	12.9	101	0.006	0.006	0.0	5
3A	7.8	12.6	104	0.891	0.373	0.518	7
3B	7.5	11.9	93	0.152	0.035	0.117	5
3C	7.5	12.0	94	0.073	0.073	0.0	5
3A 4/10	8.0	-	-	0.585	0.340	0.245	-

EXHIBIT A

Service of three (3) copies of
[illegible] is
hereby admitted this 28th day
of November, 1975

R. S. Welch (dy)
Attorney for

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Service of three (3) copies of
reply brief is
hereby admitted this 28th day
of November, 1975

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Attorney for Thomas J. Cahill
UNITED STATES ATTORNEY
11/28/75 jtravia